# Status Issues

**MAJ Chris Rofrano, Assoc Chief Counsel, NGB**

**Mr. Bill Berkson, Senior Counsel, NGB**

# AGENDA

**32 USC 325**

**Status**

**Conducting Operational Missions Under 32 USC 502(f)(2) “Other Duty”**

- 10 USC 115, OPERATIONAL SUPPORT
- 32 USC Chapter 9, Homeland Defense Activities
- Post 9-11 Airport Mission & Katrina

**Using AGRs to Conduct Federal Operational Missions**

- Impact on Various AF/Army Initiatives

**Use of AGRs,CST and CD Personnel in Domestic Ops**

- CD Personnel Performing Search & Rescue Missions
- AGRs & SAD
- CSTs Deploying to Support Domestic Ops

**Conclusion**

# Background 32 USC § 325

- 32 USC § 325 – Single Status

  *(a) Relief required.*

  *(1) Except as provided in paragraph (2),* each member of the Army National Guard of the United States or the Air National Guard of the United States who is ordered to active duty is relieved from duty in the National Guard of his State or Territory, or of Puerto Rico, or the District of Columbia, as the case may be, from the effective date of his order to active duty until he is relieved from that duty.

- NG member is in only one status at a time

# Background - 32 USC § 325

- 32 USC § 325 – Dual Status

*(a) Relief required.*

*(2) An officer of the Army National Guard of the United States or the Air National Guard of the United States is not relieved from duty in the National Guard of his State or Territory, or of Puerto Rico or the District of Columbia, under paragraph (1) while serving on active duty in command of a National Guard unit if —*

*(A) the President authorizes such service in both duty statuses; and*

*(B) the Governor of his State or Territory or Puerto Rico, or the commanding general of the District of Columbia National Guard, as the case may be, consents to such service in both duty statuses.*

# Benefit

- The statutory change allows for a National Guard Commander  familiar with State and Local area of operations to serve both in a federal and state status to provide both unity of effort and command for federal and state chains of command

# Issues

- Is dual status commander nomination limited to those who are presently commanding?
  - No
- Who controls FPCON for T32 forces?
  - The NG

# “Reverse Dual Status”

- 32 U.S.C. 315
  - “With the permission of the President, an [Regular Army or Air Force] officer so detailed may accept a commission in the Army National Guard or the Air National Guard, as the case may be, terminable in the President's discretion, without prejudicing his rank and without vacating his regular appointment.”

# DUTY STATUS “4 Hats”

1. Civilian Status

2. Title 10  Duty

3. Title 32  Duty

4. State Active Duty

# Title 10

- Active Duty-either Mob'd (10 USC 12301,12302, 12304 or Vol 12301 (d) )
  - **ANGUS/ARNGUS**
  - **Federal Money, Federal Control, Fed Missions**
  - **President is Commander in Chief – T10 chain of command UCMJ applies**

# TITLE 32

- Title 32  Duty (full-time National Guard duty and inactive duty training)

  - **Federal Money, State Control**
  - **Governor is Commander in Chief**
  - **Generally limited to training for Federal RC mission**
  - **Certain operational missions authorized by statute**
  - **State Military Justice Code applies**
  - **Benefits: USERRA, SCRA**

# State Active Duty (SAD)

- State Money, State Control
- EMAC- State Emergencies
- Governor is Commander in Chief
- State Military Justice Code applies

# Conducting Missions in a Title 32 Status

**32 USC 502**

**“Required Drills and Training**

**32 USC 502(a)**

**AT and Drill**

**32 USC 502(f)**

(f) Under regulations to be prescribed by the Secretary of the Army or Secretary of the Air Force, as the case may be, a member of the National Guard may—
(1) without his consent, but with the pay and allowances provided by law; or
(2) with his consent, either with or without pay and allowances; be ordered to perform training or other duty in addition to that prescribed under subsection (a). Duty without pay shall be considered for all purposes as if it were duty with pay.

# 32 USC 502 (f)

- Full Time National Guard Duty Special Work (FTNGDSW)
  - **Short duration tours of duty**
  - **Support the NG of the State (other than State missions)**
  - **Not AD support**

# Statutory Operational Missions under 502(f)

- FTNG Duty for Counter Drug Operations
  - **32 USC 112**
  - **To perform drug interdiction and counter-drug activities**
  - **Civil Support Teams (CST)**
  - **10 USC 12310(c)**
  - **Respond-Prepare for WMD events**
- Homeland Defense Activities
  - **32 USC Chapter 9**
- Traditional perspective
  - **“other duty” = only other duty *related to training***

# 32 USC 502(f) “OTHER DUTY”

- Basis for traditional interpretation:
  - **Title 32, Chapter 5 is related to “training”**
  - **“Required Drills and Training”**
  - **Examples in 502(f)’s legislative history are arguably all related to training.**
  - **Admin nights**

# Recent 502(f) Use

- 2004 National Security Events
  - **G-8 Summit**
  - **DNC & RNC**
  - **OPERATION Winter Freeze**
- Support provided in a training status
- Despite specific requests to perform the duties under 502(f), all units were required to show a training nexus

# *32 USC 502(f)*

## WHAT SUPPORTS NEW INTERPRETATION?

- **A proper statutory analysis**
- **Congressional interpretation of 502(f) as discerned from other statutory references**
- Real-life experience
  - **Post 9-11 Airport Security Mission**
  - **Hurricane Katrina**

# Recent Examples of Operational Missions under 502(f)“other duty”

- POTUS authorized post 9-11 airport security missions to be conducted in an 502(f)(2) other duty status despite DoD OGC’s objections.

- Sec Def authorized NG response to Katrina to be conducted in a title 32 status
  - **LA & MS requested T32 Ch 9 authority from SEC DEF**
  - **CNGB sent request for T32 operational authority to SEC DEF**
  - **DoD approves use of T32 with instructions for services to implement guidance**
  - **ARNG/ANG sends implementing guidance to the field instructing units to use 32 USC 502 (f) “other duty” as authority**
  - **Rita Ops-TX Gov requests authority directly from POTUS to use T32 operational authority-granted same night**

# HOMELAND DEFENSE 32 USC §§ 901 *et seq*

- **Authorizes the Secretary of Defense to provide funds to a Governor to employ National Guard units or personnel to conduct *homeland defense activities* in Title 32 Status (State control / Federal funding)**
- **Limits duration for personnel to 180 days or, with Governor and Secretary of Defense approval, 270 days**
- **Requires the Secretary of Defense to prescribe regulations to implement this authority**
- **Requires a Governor's request to specify (a) the homeland defense activity, (b) why the use of the National Guard is necessary and appropriate, (c) that National Guard personnel are not in Federal service**
- **Does not limit the Governor's authority to perform duties in State Active Duty Status**

# Potential uses of NG forces Under Chapter 9 – Probably NOT

- **Air Defense - Missile Defense**
- **Space Operations - Maritime Defense**
- **Protection of the Defense Infrastructure - Critical Infrastructure Protection**
- **Industrial Base (when directed by the President)**
- **AT/FP (Personnel & Installations) - CBRNE Response**
- **Cyber Defense - Information Operations**
- **Domestic Counterdrug - Domestic Combating Terrorism**
- **Mass Migration - Theater Security Cooperation**
- **DOD COOP/COG - Domestic Crisis Manager**

- NG Katrina Response as a Chapter 9 action?

# Use of AGRs to Perform Federal Operational Missions

- Active Guard and Reserve Duty – defined as:
  - Active duty or full-time National Guard duty for 180 consecutive days or more
  - For the purpose of “organizing, administering, recruiting, instructing, or training the reserve components”
  - Authorities: 32 USC 502(f); 10 USC § 101(d)(6)(A); 10 U.S.C. § 12310
- Technicians- defined as:
  - Administration and training of the National Guard
  - Maintenance and repair of supplies issued to the National Guard or the armed forces
  - Authority: 32 USC § 709

# Use of AGRs to Perform Federal Operational Missions

- AF Opines that ANG may not perform federal missions absent statutory exception (e.g., CD missions, homeland defense activities, WMD response)
  - **Exceeds legal authority**
  - **End strength implications**
  - **FTF Initiatives**
  - **Utilization of AGRs/FTNGD to perform Fed missions**

# ISSUES WITH NG TAKING FEDERAL OPERATIONAL MISSIONS

- General Rule: NG in Title 32 status is precluded from performing federal operational missions, unless

- Specific Congressional **Authority**
  - Counter-drug; funeral honors; rifle instruction; homeland defense activities; emergency preparedness for WMD
- **Training is the basis to perform the federal operational mission**
- **However, “training” cannot be a “façade” for performing an AD mission—AF Opinion Cites Theses Factors:**
  - Is the federal operational mission consistent with the National Guard unit’s formalized training program?
  - Can the federal mission be performed without the use of the National Guard unit?
  - Is there a disproportionate use of FTS personnel (AGRs and Technicians)?
  - Clear AFS/GBMD mostly staffed by AGRs

# USE OF COUNTER-DRUG PERSONNEL DOMESTIC PERATIONS

- Katrina-CD Personnel may Remain on CD Orders (T32 ADSW) While They are Directly Engaged in Saving Lives
  - Search and Rescue Missions (48 people rescued in a half a day)
- NGR 500-2/ANGI 10-801 governs use of CD Assets
  - Para 6-14 states CD assets are funded by 32 USC 112 Appropriations and intended for primary use in CD Ops
  - CD Assets/Personnel may be used in life/death ER situation to search for lost persons or to assist in search for esapees or suspected dangerous felons that pose a risk to welfare of public.
- CD funds “fenced” Costs of  ER use of CD Assets/Personnel Must be Reimbursed to CD Program.
- CD Personnel May Not take Leave and Perform SAD when Performing Katrina and like Missions
  - NGR 500-2 para 6-14f, does not comply with DoD and Army Policy on use of FTNGD Personnel

# Utilization of AGRs for DOMOPS

- AGRs can Deploy with their NG Units Ordered to SAD or T32 Duty to Support Domestic Ops
  - AGRs can Accompanying Unit and Continue to Perform their AGR Functions.
  - AGRs Assigned to Non-Deployable Units that have a Skill-Set Required by a Deploying Unit may be attached to or Cross-Leveled to the Deploying unit
  - Remain in AGR Status
  - Emergency Response Doctrine
    - Always available to respond to situations immediately when necessary to save life, prevent immediate human suffering, or lessen major property damage or destruction

# CSTs

- CST are restricted to train, prepare for, and respond to known or suspected weapons of mass destruction terrorist events

- CST are restricted to these activities within the United States, its territories and possessions, the District of Columbia, and the Commonwealth of Puerto Rico.

- In the original law, CST are referred to as “rapid assessment element team”

# CST use for Domestic Ops

- WMD Civil Support Teams may only respond to or prepare for an emergency involving the intentional use of a WMD, or a terrorist attack, or threatened terrorist attack, in the United States that results, or could result, in catastrophic loss of life or property or (with change to NDAA 07, "a natural or manmade disaster in the US that results in, or could result in, catastrophic loss of life or property."
  - All support provided during Katrina Ops was conducted under immediate response authority in accordance with DoD Directive 3025.1 or under parameters of training to prepare to respond to an emergency involving the intentional use of a WMD,
  - CST mission do not include response to an unintentional hazardous material (HAZMAT) incident, such as an overturned chemical tanker or an accidental spill
  - The use of federally funded CSTs to respond to unintentional HAZMAT events could be an Anti-Deficiency Act violation.

- For deployments OCONUS--Activate toT10 status and deploy in different UIC/UTC ""task organized capability"

# Conclusion

- Key question: what status will the trooper be in when performing a task!

# Questions

MAJ Chris Rofrano
Associate Chief Counsel
National Guard Bureau

1411 Jefferson Davis Highway
Suite 11300
Arlington, VA 22202

(Office) 703-607-2702
DSN 327-2702
(Cell) 571-239-1205
(Fax) 703-607-3682
(E-mail) Chris.Rofrano@ngb.ang.af.mil

Mr. Bill Berkson
Senior Counsel
National Guard Bureau

1411 Jefferson Davis Highway
Suite 11300
Arlington, VA 22202

(Office) 703-607-2692
DSN 327-2702